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Final Regulation Agency Background Document

Approving authority name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25 -260
Regulation title	Water Quality Standards
Action title	Amendment to the State's Antidegradation Policy (9 VAC 25-260-30) by designating portions of Big Run, Doyles River, East Hawksbill Creek, Jeremys Run, East Branch Naked Creek, Piney River, and North Fork Thornton River as Exceptional State Waters
Document preparation date	September 15, 2005

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The proposed amendment to the Antidegradation Policy section (9 VAC 25-260-30) of the State's Water Quality Standards regulation designates seven surface waters located within the boundaries of Shenandoah National Park for special protection as Exceptional State Waters (9 VAC 25-260-30.A.3.c). No changes were made to the regulation from publication of the proposed regulation to the final regulation.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The State Water Control Board adopted at their September 27, 2005 meeting an amendment to the Water Quality Standards regulation to designate seven surface waters located within Shenandoah National Park as Exceptional State Waters.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

§ 62.1-44.15(3a) of the Code of Virginia, as amended, mandates and authorizes the State Water Control Board to establish water quality standards and policies for any State waters consistent with the purpose and general policy of the State Water Control Law, and to modify, amend or cancel any such standards or policies established. The federal Clean Water Act at 303(c) mandates the State Water Control Board to review and, as appropriate, modify and adopt water quality standards. The corresponding federal water quality standards regulation at 40 CFR 131.6 describes the minimum requirements for water quality standards. The minimum requirements are use designations, water quality criteria to protect the designated uses and an antidegradation policy. All of the citations mentioned describe mandates for water quality standards.

Web Address sites where citations can be found:

Federal Regulation web site

<http://www.epa.gov/epahome/cfr40.htm>

Clean Water Act web site

<http://www4.law.cornell.edu/uscode/33/1313.html>

State Water Control Law (Code of Virginia) web site

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.2>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15>

The Environmental Protection Agency (EPA) Water Quality Standards regulation (40 CFR 131.12) is the regulatory basis for the EPA requiring the states to establish within the antidegradation policy the Exceptional State Waters category and the eligibility decision criteria for these waters. EPA retains approval/disapproval oversight, but delegates to the states the election and designation of specific water bodies as Exceptional State Waters.

The Office of the Attorney General has certified that the agency has the statutory authority to promulgate final text of the regulation.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This proposed regulatory action is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State Waters nominations as citizen petitions under § 9-6.14.71 of the Code of Virginia. Therefore, the Board took action on this petition for proposed designation because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the proposed designations met the eligibility requirements which a water body must meet before it can be afforded the extra point source protection provided by such a designation. The Exceptional State Waters category of the Antidegradation Policy allows the Board to designate waters which display exceptional environmental settings and either exceptional aquatic communities or exceptional recreational opportunities for added protection. Once designated, the Antidegradation Policy provides that no water quality degradation would be allowed in the Exceptional State Waters. The only exception would be temporary, limited impact activities. By ensuring that no water quality degradation is allowed to occur in waters with exceptional environmental settings and either exceptional recreational opportunities or exceptional aquatic communities, the Board is protecting these special waters at their present quality for use and enjoyment by future generations of Virginians.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The amendment to the Antidegradation Policy (9 VAC 25-260-30), part of the State's Water Quality Standards regulation, designates portions of Big Run, Doyles River, East Hawksbill Creek, Jeremys Run, East Branch Naked Creek, Piney River, and North Fork Thornton River for special protection as Exceptional State Waters (9 VAC 25-260-30.A.3.c).

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If there are no disadvantages to the public or the Commonwealth, please indicate.

Upon permanent regulatory designation of a water body as an Exceptional State Water, the quality of that water body will be maintained and protected by not allowing any degradation except on a very short-term basis. No new, additional or increased point source discharge of sewage, industrial wastes or other pollution would be allowed into waters designated. In addition, no new mixing zones would be allowed in the Exceptional State Water and mixing zones from upstream or tributary waters could not extend into the Exceptional State Water section.

A potential disadvantage to the public may be the prohibition of new or expanded permanent point source discharges imposed within the segment once the regulatory designation is effective that would cause riparian landowners within the designated segment to seek alternatives to discharging to the designated

segment and, therefore, to have additional financial expenditures associated with wastewater or storm water treatment. The segments of the seven waters under consideration for designation do not currently contain any permitted point source discharges.

The primary advantage to the public is that the waters will be protected at their present high level of quality for the use and enjoyment of current and future generations of Virginians.

The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing outstanding recreational opportunities and/or exceptional aquatic communities are described in the Department's November 15, 2004 "04-2021, Guidance for Exceptional State Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3)." Although all of these waters proposed for designation are located on public (federal) land, those localities and businesses located near the designated waters may experience financial benefits through an increase in eco-tourism to the area because of the exceptional nature of the water body that led to its designation.

There is no disadvantage to the agency or the Commonwealth that will result from the adoption of this amendment.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
9 VAC 25-260-30		NA	

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment
Douglas M. Atwood & Jerry P. Turner, Page Co. Farmers' Assn.	Mr. Atwood and Mr. Turner provided written comment on behalf of the Page County Farmers' Association in opposition to the proposed designation of the three streams within Page County. They stated that the regulations imposed upon farmers within the watershed would negatively impact the farmers because Tier III designations would limit their ability to expand operations. They stated that the designations could impact the tourist industry by limiting growth in the Shenandoah National Park. They also reminded DEQ staff of a petition containing 400-plus signatures in

<p>Johnnie Housden, President, Page Co. Farm Bureau Federation</p>	<p>opposition to the designation of Exceptional State Waters that was sent to DEQ in November of 2002.</p> <p>Provided written comment and spoke at the March 7, 2005 public hearing on behalf of the Page County Farm Bureau in opposition to the proposed designations. He stated that the Farm Bureau board of directors voted to oppose the proposed designations within Page County due to their belief that the designations would impose to many restrictions on landowners.</p>
<p>Lesley Clem</p>	<p>Provided written comment in opposition to the designations. He stated that, as co-owner of two poultry farms, he has experienced restrictions over the past three years and it is his belief that Tier III designations on public lands will act as a stepping stone to additional regulations and restrictions imposed upon farmers.</p>
<p>Beverly Turner</p>	<p>Spoke at the March 7, 2005 public hearing on behalf of Rappahannock Friends & Lovers of Our Waters (RAPFLOW) in support of the designations and complemented efforts supporting the designation. Two of the proposed waters are within the Rappahannock Basin.</p>
<p>Roger T. Eubank</p>	<p>Wrote in support on the designations and stated his belief that they are a positive step in protecting the natural heritage and environmental quality of the northern Blue Ridge area of Virginia. He also hopes that other eligible waters within and around the Shenandoah National Park will be considered and adopted in the future. He also provided statements of support on behalf of three other property owners in the area: Donald Eye, Dennis Lynch, and Fonda Bocknek</p>
<p>David W. Carr & Sarah A. Francisco, SELC</p>	<p>Provided written support on behalf of the Southern Environmental Law Center (SELC) in support of the designations. They stated that the streams should be designated as Exceptional State Waters because DEQ has determined that they meet the eligibility criteria and, in fact, six of the seven proposed waters meet all three of the criteria. They also state the importance of protecting and preserving waters that have not been degraded. They applaud the agency for its support of the Exceptional State Waters program.</p>

Agency response

The agency response to the public comments is that staff has determined that these seven waters proposed for designation meet the required eligibility criteria necessary for consideration as Exceptional State Waters and, to the best determination of agency staff, are wholly located on publicly owned land.

- **Issue:** The regulations imposed upon farmers within the watershed by Tier III designations would negatively impact the farmers because Tier III designations would limit their ability to expand operations.

Response: The waterbody segments proposed for designation as Exceptional State Waters are entirely contained within the Shenandoah National Park. Federal Regulation does not mandate that states establish control of non-point sources of pollution in federal Outstanding National Resource Waters or their equivalent Exceptional State Waters. EPA has stated that the Clean Water Act does provide direct regulatory authority over non-point sources and that non-point source control would rely on a voluntary program of Best Management Practices (BMPs) to achieve water quality standards. Therefore, EPA does not require a State to establish BMPs for non-point sources where such BMP requirements do not exist. The implementation of Exceptional State Waters requirements will not impose additional best management practices on any previously non-regulated activity.

- **Issue:** The designations could impact the tourist industry by limiting growth in the Shenandoah National Park.

Response: As previously stated, the waterbody segments proposed for designation are within the Shenandoah National Park. They were identified and developed as candidates in collaboration with National Park Service staff and the potential to limit future growth within the park by prohibition of point source discharges to the waters in question was discussed. Park staff indicated they had no plans for any types of activities or growth that would result in the necessity of point source discharges to the proposed waters.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9 VAC 25-260-30	N/A	<p>(1) Little Stony Creek in Giles County from the first footbridge above the Cascades picnic area, upstream to the 3,300-foot elevation.</p> <p>(2) Bottom Creek in Montgomery County and Roanoke County from Route 669 (Patterson Drive) downstream to the last property boundary of the Nature Conservancy on the southern side of the creek.</p> <p>(3) Lake Drummond, located on U.S. Fish and Wildlife Service property, is nominated in its entirety within the cities of Chesapeake and Suffolk excluding any ditches and/or tributaries.</p> <p>(4) North Creek in Botetourt County from the first bridge above the United States Forest Service North Creek Camping Area to its headwaters.</p> <p>(5) Brown Mountain Creek, located on U.S. Forest Service land in Amherst County, from the City of Lynchburg property boundary upstream to the first crossing with the national forest</p>	The addition of seven water bodies to 9 VAC 25-260-30.A.3.c. These waters meet the eligibility criteria necessary to be designated as Exceptional State Waters.

		<p>property boundary.</p> <p>(6) Laurel Fork, located on U.S. Forest Service land in Highland County, from the national forest property boundary below Route 642 downstream to the Virginia/West Virginia state line.</p> <p>(7) North Fork of the Buffalo River, located on U.S. Forest Service land in Amherst County, from its confluence with Rocky Branch upstream to its headwaters.</p> <p>(8) Pedlar River, located on U.S. Forest Service land in Amherst County, from where the river crosses FR 39 upstream to the first crossing with the national forest property boundary.</p> <p>(9) Ramseys Draft, located on U.S. Forest Service land in Augusta County, from its headwaters (which includes Right and Left Prong Ramseys Draft) downstream to the Wilderness Area boundary.</p> <p>(10) Whitetop Laurel Creek, located on U.S. Forest Service land in Washington County, from the national forest boundary immediately upstream from the second railroad trestle crossing the creek above Taylors Valley upstream to the confluence of Green Cove Creek.</p> <p>(11) Ragged Island Creek in Isle of Wight County from its confluence with the James River at a line drawn across the creek mouth at N36°56.306'/W76°29.136' to N36°55.469'/W76°29.802' upstream to a line drawn across the main stem of the creek at N36°57.094'/W76°30.473' to N36°57.113'/W76°30.434', excluding wetlands and impounded areas and including only those tributaries completely contained within the Ragged Island Creek Wildlife Management Area on the northeastern side of the creek.</p>	
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In 9 VAC 25-260-30 the following amendment was adopted by the State Water Control Board:

(12) Big Run in Rockingham County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of Big Run within the confines of Shenandoah National Park.

(13) Doyles River in Albemarle County from its headwaters to the first crossing with the Shenandoah National Park boundary and Jones Falls Run from its headwaters to its confluence with Doyles River and all tributaries to these segments of Doyles River and Jones Fall Run within the confines of Shenandoah National Park.

(14) East Hawksbill Creek in Page County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of East Hawksbill Creek within the confines of Shenandoah National Park.

(15) Jeremys Run in Page County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of Jeremys Run within the confines of Shenandoah National Park.

(16) East Branch Naked Creek in Page County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of East Branch Naked Creek within the confines of Shenandoah National Park.

(17) Piney River in Rappahannock County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of the Piney River within the confines of Shenandoah National Park.

(18) North Fork Thornton River in Rappahannock County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of the North Fork Thornton River within the confines of Shenandoah National Park.

Regulatory Flexibility Analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The water body segments proposed for designation are on federal land within the Shenandoah National Park and there are no small businesses that would be impacted.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights

of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The development of water quality standards is for the protection of public health and safety, which has only an indirect impact on families.